

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF &  
APPENDIX**



ORIGINAL

311

**76-7623-7625**

IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

**Nos. 76-7623, 76-7624 and 76-7625**

HOWARD D. REAGAN and JAMES E. HARRIS,  
*Plaintiffs-Appellants,*  
*against*

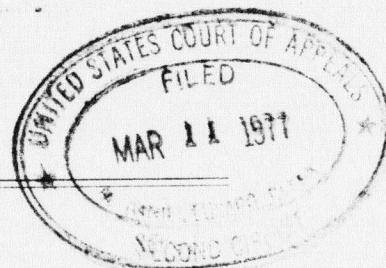
BATTERY STEAMSHIP CORPORATION as owner  
of the SS THUNDERHEAD,  
*Defendant-Appellee.*

**BRIEF FOR APPELLANTS AND JOINT APPENDIX**

FULLER, LAWTON & MOYLES, P.C.  
c/o C. E. Walker  
64 Fulton Street  
New York, N.Y. 10038  
(212) 267-4737  
*Attorneys for Appellants*

CLARE EDWARD WALKER  
*Of Counsel*

March 11, 1977



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## **BRIEF FOR APPELLANTS**

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### **Preliminary Statement**

Plaintiffs-seamen appeal from Final Judgments of dismissal with prejudice for failure to prosecute, entered below pursuant to order of United States District Judge Charles L. Brieant. There are no reported decisions on the matters.

### **Issue Presented for Review**

Whether, in these seamen's actions, the District Court abused its discretion in dismissing the cases with prejudice pursuant to FRCP 41 (b) for failure to prosecute under the following facts and circumstances?

#### **a. Facts peculiar to First Reagan Case (76-7624)**

Defendant-shipowner sought to dismiss this 1969 action in June of 1972; the motion was granted on default but defendant failed to settle the necessary order or judgment. On December 4, 1972, plaintiff successfully moved for an order vacating the dismissal upon the ground that plaintiff was imprisoned and, accordingly, was unable to appear for deposition or prosecute the action.

#### **b. Facts peculiar to the Harris Case (76-7625) and the Second Reagan Case (76-7623)**

Begun December 7, 1972, issue was joined in January of 1973 in both the Harris Case and the Second Reagan Case.

#### **c. Facts common to all three cases**

From May 8, 1973, pending Reagan's release from prison, all three cases were either on the suspense calendar

and/or closed for statistical purposes. On October 5, 1976, the actions were transferred to the active dockets pursuant to order of Judge Brieant.

Defendant-Shipowner's motion papers, served on September 7, 1976, failed to make any claim of prejudice because of plaintiffs' alleged failure to prosecute.

Plaintiffs' attorney, on September 27, 1976, the initial return day of the motion, orally advised the Court that he had been unsuccessful in attempts to contact his clients; that his firm was in dissolution and that he was unable to continue in the practice of law because of eye disability and had, in fact, been out of the practice of law for over a year; that he needed time to engage another lawyer, locate his clients and see if they wanted to proceed further. The Court, on that initial return date, asked the parties to discuss the possibility of a modest settlement.

Thirty-seven days later, on the ultimate return date of defendant's motion, plaintiffs' attorney failed to appear or submit papers in opposition, albeit, between the initial return date and the continued date, he had submitted settlement offers in keeping with the Court's suggestion.

### **Statement of the Case**

Claiming personal injuries and mental anguish suffered because of assaults made upon him by fellow crewmen with known vicious propensities, plaintiff Harris sues shipowner for \$100,000 damages (Harris Complaint 1).<sup>1</sup> Plaintiff-Reagan brought two similar suits for assault by fellow crewmen with known vicious propensities, asking some \$161,000 damages in his 1969 action and \$250,000 in

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<sup>1</sup> Where documents have not been reproduced in the appendix, we refer directly to the official document designation in the Index to the Record on Appeal. Otherwise, we refer to the appendix, e.g. "A22" refers to Affidavit of Hart in Harris case, which is reproduced in the appendix.

his 1972 action against the same shipowner (Reagan Complaints 1). All three suits are particularly concerned with activities and assaults aboard the SS THUNDERHEAD while she was in the Port of Bremerhaven on December 16, 1966 (Complaints).

On May 8, 1973, all three actions were transferred to the suspense calendar of the Court, subject to reassignment upon filing of a stipulation when Reagan was released from prison (A1, 3 & 4).<sup>2</sup> On June 17, 1976 the Harris Action was marked statistically closed (A3). The 1969 Reagan action was likewise closed on April 25, 1975, with the order vacated and annulled on May 5, 1975 (A1). It does not appear that the Second Reagan Action was ever marked "statistically" closed (A4).

The next activity in the case was initiated by Defendant-Shipowner's Notice of Motion to Dismiss for failure to prosecute pursuant to FRCP 41(b), filed September 7, 1976 (A2, 3 & 4 and see A20, 22 & 25).

The body of Defendant's Memorandum of Law in support of its motions in the three cases read *verbatim in toto*:

Rule 41(b) of the Federal Rules of Civil Procedure reads as follows:

"Involuntary Dismissal: Effect Thereof.

For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. \* \* \*

Conspicuously absent from that Memorandum (and from Defendant's Affidavit in Support of the Motion set forth

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<sup>2</sup> While the record, itself, is not entirely clear, it appears that Reagan was released from Federal Prison toward the end of 1975 or early in 1976. See p. 2 of Aff. in Supp. of Motion to Dismiss in Harris, sworn to September 7, 1976 (part of 10 set forth in full in appendix).

in full in the appendix) is any reference whatsoever even suggesting that plaintiff's failure to proceed with dispatch had prejudiced defendant (Reagan 9 & 14, Harris 11 for Memos; A20, 22 & 25).

Proceedings on the return of the motions were first held on September 27, 1976 (A28). On that date the Court observed that the cases had been placed on the Suspense Calendar "because somebody was in prison". The quoted observation was generated by plaintiffs' attorney's statement to the Court that he had had no notice that the cases had been removed from the Suspense Calendar. The record, in fact, shows that the order transferring the cases to the active docket was filed on October 5, 1976 (A2, 3 & 4).

At the September 27th hearing, plaintiffs' attorney further advised the Court that Reagan was now out of prison, but that he had not been able to contact him. He also stated that he did not know where plaintiff-Harris was; that his last information was that Harris was in the District of Columbia. In addition plaintiffs' attorney advised the Court that his firm was dissolved and that he was unable to continue the practice of law because of eye disability and had, in fact, been out of practice for over a year; that he needed time to engage other counsel, locate his clients and see whether they wished to continue the actions. In continuing the motion to October 8, 1976, the Court concluded by suggesting the possibility of a modest settlement (A33).

Thirty-seven days later, on the ultimate return date of defendant's motions, plaintiffs' attorney failed to appear or submit papers in opposition, although, between the initial return date and the continued date he had submitted a settlement offer in keeping with the Court's suggestion. (Transcript of Proceedings of November 3, 1976, which will be number 14 in the INDEX TO THE RECORD ON APPEAL in Harris, but which was inadvertently not ordered by plaintiff until February 22, 1977. The Court Reporter

was directed to file said transcript on that date. It is set forth in full in the appendix at A34).

On November 3, 1976, the District Court filed the Court's Memo-endorsed on all three Notices of Motion dated September 7, 1976 (Part of Harris 10, Reagan 8 & 13). That Memo read:

"Nov 3 1976

Motion Granted and action dismissed with prejudice for failure to prosecute. No Appearance in opposition. See transcript of hearing this date

So ORDERED

s/ Charles L. Briant  
U. S. D. J."

On November 15, 1976, Final Judgment of Dismissal with prejudice was, accordingly, entered. Notice of Appeal from that Judgment was filed on December 9, 1976 (A2, 3 & 4).

### ARGUMENT

**In dismissing for failure to prosecute upon plaintiffs' attorney's default in filing opposition papers and appearing, the District Court ignored at least three relevant factors: lack of prejudice to defendant, plaintiffs' counsel's physical disability and the availability of less drastic sanctions. Accordingly, the Court abused its discretion.**

Although this Court has only reluctantly reversed dismissals for failure to prosecute, it has done so in proper cases. E.g., *Peterson v. Term Taxi, Inc.*, 429 F. 2d 888 (2 Cir. 1970); *Vindigni v. Meyer*, 441 F. 2d 376 (2 Cir. 1971). This Court's attitude as to what constitutes abuse of discretion, observes that appellate courts appear to have made "two rather different formulations of what constitutes such abuse." *Finley v. Parvin/Dohrmann Company*,

*Inc.*, 520 F. 2d 386, 390 (2 Cir. 1975). It then sets forth the rigorous standard of Judge Haney in *Delno v. Market St. Ry.*, 124 F. 2d 965, 967 (9 Cir. 1942),<sup>3</sup> compares it with the

"\* \* \* more generous standard of review [which] is suggested in Judge Magruder's equally well-known opinion in *In re Josephson*, 218 F. 2d 174, 182 (1 Cir. 1954), a formulation which we have approved in other contexts, see, e.g., *Carroll v. American Federation of Musicians*, 295 F. 2d 484, 488-89 (2 Cir. 1961):

'Abuse of discretion' is a phrase which sounds worse than it really is. All it need mean is that, when judicial action is taken in a discretionary matter, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors." 520 F. 2d at 390 (emphasis supplied)

and then gave hope to these plaintiffs by the negative-pregnant appearing in the next sentence of its opinion:

"A review of the cases dealing with dismissals or refusals to dismiss under F.R. Civ. P. 41(b) indicates that the stricter standard of review should be applied at least when the district court has refused to dismiss. \* \* \*" 520 F. 2d 386, 390 (emphasis supplied)

This negative-pregnant was further bolstered when this Circuit also said in this appeal from a refusal to dismiss that

"\* \* \* It is also significant that, while a dismissal with prejudice \* \* \* is a very harsh sanction, see 9 Wright & Miller, *Federal Practice and Procedure* § 2369 at

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<sup>3</sup> "If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

193-99 (1971), a refusal to dismiss merely forces the defendant to trial." 520 F. 2d at 391

*A fortiori*, this Court must needs apply the more generous rule. The subjunctive is imperative because dismissal deprives plaintiffs of their Fifth Amendment Rights. See Black, J., dissenting in *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1961), 646, talking about mechanical rulings of the court. There, at page 646, Mr. Justice Black said:

"\* \* \* The plaintiff's cause of action is valuable property within the generally accepted sense of that word, and, as such, it is entitled to the protections of the Constitution. Due process requires that property shall not be taken away without notice and hearing. \* \* \*"

Here the plaintiffs' attorney had notice. Query: Did the plaintiffs?

Dismissal with prejudice should only be resorted to in extreme cases where there is "a clear record of delay or contumacious conduct by the plaintiff." *Connolly v. Papachristid Shipping Ltd.*, 504 F. 2d 917, 920 (5th Cir. 1974); *Durham v. Florida East Coast Railway Co.*, 385 F. 2d 366 (5 Cir. 1967); *Boazman v. Economics Laboratory, Inc.*, 537 F. 2d 210 (5 Cir. 1976); *Graves v. Kaiser Aluminum & Chemical Co., et al.*, 528 F. 2d 1360 (5 Cir. 1976).

"Absent such a showing, the trial court's discretion is limited to the application of lesser sanctions designed to achieve compliance and expedite the proceedings."

*Graves v. Kaiser Aluminum & Chemical Co.*,  
*supra*, at p. 1361.

As respects availability of lesser sanctions, see also *Peterson v. Term Taxi Inc.*, 429 F. 2d 888, 890 (2 Cir. 1970).

Here, until half-way through the period the motion to dismiss was pending, the cases were on the suspense calendar. They were on suspense from May 8, 1973 until October 5, 1976 (A1, 3 & 4). It would therefore appear that prior to the September 27th hearing, plaintiffs engaged in no dilatory tactics nor did they fail to prosecute their cases in anything but an orderly manner.

As in *Graves v. Kaiser Aluminum & Chemical Co.*, 528 F. 2d 1360, 1362, *supra*, on the date the default was noted,

"the court had no reason to believe that plaintiff's failure to comply with his orders resulted from intentional misconduct as opposed to a mix-up in dates or some other less culpable mistake."

It should be remembered that the court here, itself, initially called for a continuance to October 8th (A32-33) and, for reasons not appearing on the record, rescheduled for November 3rd (A34).

Other relevant factors to be weighed on a motion to dismiss include plaintiff's right to a hearing, possible impairment of defendant's case which might be presumed from unreasonable delay, prompt disposition of law suits, and plaintiffs' duty to proceed with dispatch. *States SS Co. v. Philippine Air Lines*, 426 F. 2d 803 (9 Cir. 1970).

Nowhere on the record is there any claim of delay having prejudiced defendant.\*

In weighing *all* relevant factors, we submit that the court could have been much less drastic and achieved a just result.

When the court transferred the cases to the active docket on October 5, 1976, less than a month before it decided the

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\* Nor, on this record do we feel the court should have (although it, concededly, could have) presumed prejudice. If defendant was not prejudiced while awaiting Reagan's release from prison for over three years, what prejudice appeared when Reagan became a free man?

pending motions, it could have ordered trial. Under the present calendar system, certainly the plaintiffs could not have moved their cases with more dispatch. See *Finley et al. v. Parvin/Dohrmann Co., et al.*, 520 F. 2d 386 *supra*, at 389 discussing the Individual Assignment System. The court well knew that plaintiffs' counsel was disabled and was looking for substitute counsel and further instructions from his clients. If illness of counsel is a sound basis for continuance (*Smith-Weik Machinery Corp. v. Murdock Machine and Engineering Co.*, 423 F. 2d 842 (5 Cir. 1970)), certainly it should be a basis for a less drastic sanction than dismissal. And See *Peterson v. Term Taxi, Inc.*, 429 F. 2d 888, 890 (2 Cir. 1970).

#### CONCLUSION

**For the reasons and upon the authorities recited above, the decision below should be reversed.**

Respectfully submitted,

FULLER, LAWTON & MOYLES, P.C.  
*Attorneys for Appellants*

CLARE EDWARD WALKER  
*Of Counsel*

## **APPENDIX**

A      1

DOCKET ENTRIES:    REAGAN 69 CIV. 1809

Howard D. Reagan vs. Battery Steamship  
Corp., 69 Civil 1809, Judge Brieant

Date -----	Proceeding -----	Date Order or Judgment Noted
Apr.30,69	Filed complaint and issued summons.	\$15
May.16.69	Filed summons and return Served Battery Steamship Corporation by Mr. Ceddschalm on 5.6.69	\$3.36
Jun 18.69	Filed ANSWER OF Deft	KCK
Oct.30-69	Filed Plaintiff's Answer to Interrogs.	
Jun 15-72	Filed deft's notice of motion. Re: Dismiss Action. Ret. 1-29-72	
Jun 15-72	Filed deft's memorandum of law in support of motion to dismiss.	
Jun 29-72	Filed MEMO. END. on motion filed 6-15-72 Motion granted on Default. SETTLE ORDER ON NOTICE. Brieant J.	
Dec 4.72	Filed Affidavit of William E. Fuller in opposition to the motion of Dft. for a default judgment, etc. by pltff.	
Dec 4.72	Filed Memorandum & Order. Motion to dis- miss for failure to appear for deposition pursuant to notice, as indicated; If the dft. elects to take the pltffs depositions at Atlanta Ga., or such other place within the continental U.S. as he may be confined, each party shall pay his own costs & expenses, and same shall be taxable in favor of the successful party to the extent that the court may direct on the conclusion of the litigation So Ordered Brieant J. (Mailed notice)	
May 8-73	Filed Order that each of the above entitled actions be transferred to the Suspense Docket of this court, Subject to reassignment to a judge upon the filing of a Stipulation when Howard D. Reagan is released from prison, So Ordered Brieant J. m/n	
4-25-75	Filed Order that this action is statistically closed . . . Brieant, J. mn	
5-5-75	Filed Order that the order of this Court made 4-25-75 is vacated and annulled and the action shall continue to stand upon the suspense Docket of This Court . . . Brieant, J. mn	

5-9-75	Filed Letter (copy) to Hon. E. H. Levi, att Genn of US. from firm of Fuller Lawton & Moyles, by W. Fuller dated 5-8-75.
9-7-76	Fld Deft's Motion for an order dismissing action pur to FRCP 41 ( )..ret 9-28-76-9:30AM Rm 1506.
9-7-76	Fld Memo of Law in support of its motion to dismiss.
10-5-76	Fld Order that action is transferred to Active Docket...Brieant, J. mn
11-3-76	Filed Memo-endorsed on Motion dtd 9/7/76-- Motion Granted and action dismissed with pre- judice for failure to prosecute. No appearance in opposition. See transcript of hearing this date. - So Ordered - BPIEANT, J.
11-15-76	F1 Final Judgment of Dism with prej Judg Ent 11-15- 76 Clerk Approved Judge Brieant. mn
12-9-76	F1 Pltff's Notice of Appeal From Final Judg ent 11-15-76. Copy Mailed on 12-10-76 to: Kirlin, Campbell & Keating
12-13-76	Filed transcript of record of proceedings dated 9-27-76
[ ]	[Filed transcript of hearing dated 11-3-76]

DOCKET ENTRIES:    HARRIS 72 CIV. 5200

James E. Harris vs. Battery Steamship Corp., etc.  
72 Civ. 5200, Judge Brieant (In Admiralty)

Date	Proceeding	Date Order or Judgment Noted
Dec 7.72	Filed Complaint issued summons	
Dec.15-72	Filed Notice of Appearance for Battery Steamship Corp.	
Dec 27.72	Filed Stip & Order that the time for dft. to answer to complaint is extended to 1/12/73 So Ordered Brieant J.	
Jan 3.73	Filed Summons and marshals ret. Served: Sec. of State of N.Y. on 12/15/72 Battery Steamship Corp., etc. on 12/11/72 Lamorte Burns & Co., Inc. on 12/11/72	
	Unable to serve: Kirilin Campbell & Keating	
Jan 11.73	Filed ANSWER	KC&K
Jan 11.73	Filed Dfts. Notice of Deposition.	
Jan 12.73	Filed Interrogs: Addressed to Pltff. to be answered in writing & under oath.	
May 8-73	Filed Order that each of the above entitled actions be transferred to the Suspense Docket of this court, subject to reassignment to a judge upon filing of a stipulation when Howard D. Reagan is released from Prison. So Ordered Brieant J. m/n	
6-17-76	Fld Order statistically closing action . . . Brieant, J. mn	
9-7-76	Fld Deft's motion to dismiss our 41 b. ret 9-29-76 9:30 AM	
9-7-76	Fld Deft's memo in support of motion to dismiss	
10-5-76	Fld Order that action is transferred to active docket . . . Brieant, J. mn	
11-3-76	Filed Memo-endorsed on Notice of Motion dtd 9/7/76 - Motion granted and action Dismissed with prejudice for failure to prosecute. No appearance in opposition se transcript of hearing this date. So ordered -BRIEANT, J. (m/n)	
11-15-76	Fld Final Judg of dismissal with prej. R F Burghardt Clerk Approved Briean [sic], J. mn	
12-9-76	Fl Pltff's Notice of Appeal to USCA from Judgment 11-15-76. Copy Mailed on 12-10-76 to: Kirilin, Campbell & Keating.	
12-13-76	Fld transcript of record of proceedings dated 9-27-76	
[           ]	[Filed transcript of record of proceedings dated 11-3-76]	

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DOCKET ENTRIES: REAGAN 72 CIV. 5201

Howard D. Reagan vs. Battery Steamship Corp. etc.  
72 Civ. 5201, Judge Brieant (In Admiralty)

Date	Proceeding	Date Order or Judgment Noted
Dec 7-72	Filed Complaint & Issued Summons	\$15
Dec 7-72	Filed Pltffs demand for a trial by jury.	
Jan. 4 73	Filed Summons & Marshall's return	
Jan. 11-73	Filed DEFTS ANSWER TO THE COMPLAINT.	K.C. & K.
Jan. 11-73	Filed Defts Notice of taking Deposition [sic].	
Jan. 12-73	Filed Defts interrogatories addressed to the plttf.	
May 8-73	Filed Order, that each of the above entitled actions be transferred to the suspense docket of this court, subject to reassignment to a Judge upon filing of stipulation when Howard D. Reagan is released from prison, So Ordered Brieant J. m.n	
9-7-76	Fld Defts motion for an order to dismiss pur to FRCP 41() (1). ret 9-27-76 2:30 AM Rm 1506	
9-7-76	Fld Defts Memo in support of its motion to dismiss.	
10-5-76	Fld Order that action is transferred to active docket. . . Brieant, J. mn	
11-3-76	Filed Memo-endorsed on Notice of Motion dtd. 9/7/76 -- Motion granted and action dismissed with prejudice for failure to prosecute. No appearance in opposition See transcript of hearing this date - SO ORDERED BRIEANT, J. (m/n)	
11-15-76	Fld Final Judg of dismissal with prej Judg Ent 11 15 76 Clerk Approved Brieant, J. mn	
12-9-76	F1 Pltff's Notice of Appeal to USCA from Judg ent 11-15-76. Copy mailed on 12-10-76 to: Kirlin, Campbell & Keating.	
12-13-76	Filed transcript of record of proceedings dated 9-27-76	
[	]	[Filed transcript of hearing of 11/3/76]

AFFIDAVIT OF ROBERT P. HART IN SUPPORT OF MOTION TO DISMISS  
PURSUANT TO FRCP 37(d) OR 41(b), DATED JUNE 14, 1972  
[REAGAN 5]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

HOWARD REAGAN,

Plaintiff

-against-

BATTERY STEAMSHIP CORPORATION,

Defendant

-----X

AFFIDAVIT IN SUPPORT  
OF MOTION TO DISMISS  
PURSUANT TO RULE 37(d)  
OR RULE 41(b) ~~CPLR~~  
FRCP

No.

69 CIV. 1809

State of New York       )  
                              : ss.:  
County of New York     )

ROBERT P. HART, being duly sworn, deposes and  
says:

I am a member of the firm of KIRLIN, CAMPBELL & KEATING,  
attorneys for the defendant, BATTERY STEAMSHIP CORPORATION, here-  
in, and I am familiar with all the pleadings and proceedings here-  
tofore filed and had herein.

This affidavit is submitted in support of defendant's  
motion for an order pursuant to <sup>FRCP</sup> ~~CPLR~~ 37(d) dismissing the action  
because of the failure of the plaintiff to appear for his examin-  
ation before trial pursuant to notice, or, in the alternative, an  
order pursuant to <sup>FRCP</sup> ~~CPLR~~ 41(b) dismissing the action because of the  
failure of plaintiff to prosecute his action.

This is an action by one HOWARD REAGAN, a seaman, to  
recover damages for injuries allegedly sustained aboard the SS

THUNDERHEAD on December 16, 1966, as well as his claim for false arrest and unlawful imprisonment arising out of the incident of the aforementioned date. The action was commenced by the filing of a summons and complaint on April 30th, 1969.

Under date of June 18, 1969 defendant's attorneys served upon the attorneys for plaintiff a notice of the taking of plaintiff's deposition on the 17th day of July, 1969. Said examination before trial was, from time to time, adjourned, but, to date, plaintiff has failed to appear for his examination before trial.

On December 16, 1966, one JOSEPH J. SPEIDEL was found with his throat cut while the vessel, SS THUNDERHEAD, was maneuvering in the harbor at Bremen, Germany. All the factors appeared to point to plaintiff as the doer of this misdeed. Subsequently he was arrested by the German police and held for a period of three and one-half months.

Ultimately plaintiff was indicted for burglary, robbery and murder in the United States District Court for the Northern District of Ohio, in September 1969. Plaintiff was convicted of manslaughter in October 1970 and sentenced to ten (10) years imprisonment. He appealed to the Court of Appeals for the Sixth Circuit, which denied the appeal, and subsequently petitioned the United States Supreme Court for a writ of certiorari. His petition for certiorari has been denied.

A      7

Affidavit of Robert P. Hart in Support of Motion to Dismiss  
Pursuant to FRCP 37(d) or 41(b), Dated June 14, 1972

Inasmuch as plaintiff cannot presently prosecute the matter and more than likely his conviction is an absolute defense to his claim against the defendant shipowner, it is respectfully requested that plaintiff's action be dismissed pursuant to ~~CPLR~~<sup>FRCP</sup> 37(d) for failure of the plaintiff to appear for his examination before trial, pursuant to notice, or, in the alternative, dismissed pursuant to ~~CPLR~~<sup>FRCP</sup> 41(b) because of the failure of the plaintiff to prosecute his action.

WHEREFORE, it is respectfully requested that the defendant's motion be, in all respects, granted.

Robert P Hart

Sworn to before me this        :  
   :  
14 day of June, 1972.        :

VINCENT J. LYNCH  
Notary Public, State of New York  
No. 24-7625200  

---

Notary Public in New York County  
Certificate Filed in New York County  
Commission Expires March 30, 1974

A                      8

AFFIDAVIT OF WILLIAM E. FULLER IN OPPOSITION TO MOTION  
TO DISMISS PURSUANT TO FRCP 37(d) OR 41(b), DATED  
NOVEMBER 21, 1972 [REAGAN 7]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

HOWARD REAGAN,	:	
	:	
Plaintiff,	:	69 Civil 1809
	:	
-against-	:	<u>AFFIDAVIT</u>
	:	
BATTERY STEAMSHIP CORPORATION,	:	
	:	
Defendant.	:	

----- x

STATE OF NEW YORK )  
                          ) ss.:  
COUNTY OF NEW YORK)

I, WILLIAM E. FULLER, being duly sworn, depose and say:

1. That I am an attorney and partner in the firm of Fuller Lawton & Moyles, P.C. and that I am familiar with all the pleadings and proceedings heretofore had herein.

2. That this affidavit is made in opposition to the motion of the Defendant for a default judgment for failure to appear for a deposition and to dismiss for failure to diligently prosecute. Alternatively, the affidavit is made as a Motion to Re-open a Default Judgment and/or for a Protective Order.

3. That deponent, on behalf of Plaintiff, alleges that by reason of imprisonment since September 15, 1969, in prison in Ohio and Atlanta, Georgia, the Plaintiff has been unable to appear for deposition or prosecute this action in New York and/or his similar civil action under the Jones Act against his employer arising in 1968 from employment on a Great Lakes vessel in Cleveland, Ohio.

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*Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972*

4. That on behalf of Plaintiff, deponent alleges to his best knowledge and belief that Plaintiff's imprisonment is the result of actions by attorneys for the United States and attorneys for Defendant steamship companies in bringing criminal charges to obtain an advantage in a civil action contrary to the disciplinary rules of the Code of Professional Conduct for attorneys and a conspiracy of said attorneys with agents and officers of the United States Coast Guard and Department of Justice and defendant steamship company acting in conspiracy contrary to the Civil Rights Act, 42 U.S.C. 1985 and 1986, to deprive Plaintiff of his right to sue his employer under the Jones Act, of his liberty, of his right to due process of law and his right to equal protection of the law, under the following facts:

Plaintiff was a seaman crew member on board the SS THUNDERHEAD, among others, when the vessel was in Bremerhaven, Germany on December 16, 1966. During the period of time in which the ship's electrician, Joseph J. Speidell was the apparent victim of an assault homicide. That Plaintiff, as an apparent suspect, was taken into custody by the Master and turned over for arrest by the German police. On December 17, 1966, by Judicial Decree, Plaintiff was remanded to a State Institution in Bremen, Germany for custody, care and treatment. After the homicide on December 16, 1966, an investigation was conducted on board the vessel by German police and prosecuting authorities which was attended by the Master and an attorney of the company acting in the Master's behalf for the vessel's underwriter, and by the United States

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*Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972*

Coast Guard investigating officer from Bremen, Germany. The general investigation continued until April 5, 1967 and cleared Plaintiff on the evidence from any homicide. The District Court in Germany, on a hearing and examination of the evidence held that there was no probable cause to arrest Plaintiff on a warrant of murder of Speidell and was ordered discharged from custody. The District Court found that there was no greater suspicion of Plaintiff than any other member at the time.

5. That prematurely, by a letter under the date of December 24, 1966 the attorney engaged to represent the Master in the company reported to the company that as a result of the investigation, Plaintiff killed Mr. Speidell. That under date of December 19, 1966, the United States Coast Guard investigation officer reported " there was little doubt of Reagan's guilt". That Mr. Cedarholm, an officer of defendant, turned the attorneys letter over to the United States Coast Guard and the Admiralty and Shipping Department attorneys in New York. That based upon the Master's log book entry, the Master's official report of casualty, the Master's statement to the Coast Guard, the United States Coast Guard investigation officer in New York on May 5, 1967 made an official report of investigative finding as a matter of fact and conclusion of law that Plaintiff Reagan killed Speidell. The latter officer made this report without revealing the premature determinations above in his official file and in complete disregard of a Coast Guard and FBI interview with the Plaintiff on or about April 15, 1967 upon his arrival in New York.

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*Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972*

6. That Plaintiff filed this suit in April, 1969 to recover for his personal injuries on board the ship at the hands of known viscious and criminal crew members who presumably assaulted and killed Mr. Speidell. As a result of those injuries, Plaintiff suffered amnesia and a total failure of recollection of events on that day. Subsequently thereto and secretly the Plaintiff was, by the attorneys of the Government and for the company, and by agents and officers of the company and the Coast Guard, through transfers of the above incomplete and incorrect records, caused to be indicted secretly, arrested and imprisoned since September, 1969. That after Defendant was arrested and incarcerated in Ohio, the attorneys for Defendant moved for a deposition. That after Plaintiff was convicted through deprivation of his Constitutional rights, the complete record of his 1600 page trial transcript and discovery in Germany was offered to the attorneys for Defendant. Because the Plaintiff was thereafter imprisoned in Atlanta, Georgia, defendant moved for default judgment and/or dismissal for failure to prosecute.

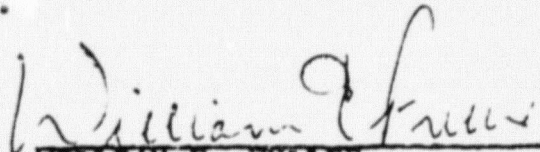
7. That Plaintiff requires no further discovery except a copy of the time charter of the SS THUNDERHEAD to the United States of America, MSTs, and insurance agreements and contracts pursuant to Rule 33, F.R.C.P. All materials discovered in the course of the investigation in the criminal trial have been offered to and available to Defendant.

8. That the Plaintiff on or about January, 1973, will complete the minimum one-third of his sentence to be eligible for

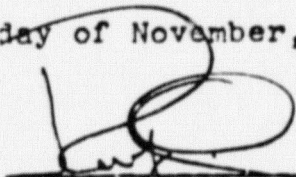
*Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972*

parole from Federal Prison and should be able to appear for his deposition and his trial at any reasonable time thereafter set by the Court.

WHEREFORE, it is respectfully requested that Defendant's motion for a default judgment for failure to appear for a deposition and/or motion to dismiss for failure to prosecute be denied or in the alternative, that the default judgment be re-opened and/or a protective order be made to provide for the deposition of Plaintiff and the costs thereof at his point of incarceration in Atlanta, Georgia.

  
WILLIAM E. FULLER

Sworn to before me this 21st  
day of November, 1972.

  
ROBERT L. MAWTON  
Notary Public, State of New York  
No. 41-7453275  
Qualified in Queens County,  
Term Expires March 30, 1974

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*Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972*

Sworn Translation  
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-199-/-201-

4 Gs 665/67

54 Js 2583/66

COURT ORDER

Reference the preliminary investigation procedure concerning  
the ordinary seaman Howard REAGAN, born in  
Cleveland, Ohio, on October 25, 1940, at present  
at the Municipal Mental Hospital of Bremen

for murder

the hospitalization order of Bremerhaven District Court of  
December 17, 1966, is hereby cancelled upon application filed  
by the Public Prosecutor's Office.

The application made by the Public Prosecutor for a warrant  
for the arrest of the accused to be issued is hereby  
refused.

GROUNDS:

According to the result of the concluded investigations the  
accused is no longer under strong suspicion of having  
committed the murder of which he is accused. The remaining  
suspicion that he committed the crime is substantially  
based on the conspicuous behaviour of the accused after  
the crime and his own incriminating statements. This  
remaining suspicion does not make it appear likely that  
the accused will be sentenced.

The accused himself was very much under the influence of  
alcoholic drinks at the time of the offence. It is cer-  
tain that during the morning of the day of the deed the  
accused had been drinking with Speidell who was killed and  
that he was also in the cabin of Speidell. It will not be

.../2

A 11

Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972

- 2 -

possible to refute the claim of the accused that Speidell had made him an indecent proposal and offered him money. The accused cannot recollect any further details which appears to be credible in view of his state of intoxication.

As proved by the findings at the scene of the crime physical violence must obviously have occurred in the cabin of Speidell. It is not to be denied that at this occasion the accused <sup>may have</sup> suffered the left hand face wounds found on him. In spite of his lack of memory the accused himself is of the opinion that he may have inflicted the fatal incision wound on Speidell. There are no third party witnesses of what happened. If the incision wound was indeed inflicted by the accused it cannot be excluded that he did so in self-defence to ward off an attack by Speidell. His own injuries that were not there before might indicate this. The remark made by <sup>that</sup> the accused when addressing Captain Rismondo to the effect Speidell had tried to kill him ("He tried to kill me") might also be indicative of this. Also when talking to the Chief Mate Mr. Adams the accused stated that "Speidell had wanted to fight him". In particular it proved impossible to determine whether the fatal cut was inflicted on Speidell in his cabin or in the toilet near by.

The sparse remarks made by Speidell did not clarify matters sufficiently. He was obviously unable to name the perpetrator particularly so because he was himself intoxicated and was obviously dizzy as a result of the injury. The remark made by Speidell on the bridge to the witness Rismondo: "They (he) tried to get my money" is of no help. The accused claims that he himself had still had DM 130 and \$ 20. 365 Dollars that were in the cabin of Speidell were later on found there under his mattress. According to the testimony of the witness Rismondo Speidell stayed on the bridge for about ten seconds without nominating the per-

*Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972*

- 3 -

petrator. The Third Officer Brande then took Speidell down below from the bridge. Although Speidell still replied to another question asked by the witness Brande before he collapsed he did not say a word in reply to several questions as to the perpetrator asked earlier by the Witness.

It is incriminating for the accused that in his excited condition he made remarks when Speidell was taken ashore to the effect that he was hoping that Speidell would die and that he had killed him all this according to the substantially concordant testimony of the witnesses Awalt, Hult and Hinds. The accused was also in possession of two knives which were taken into custody. It is to be noted from the testimony of the witnesses Henderson and Howard that the accused has been seen on board manipulating these knives during the forenoon of the day of the crime.

It may be left undecided as to what value should be attached to the circumstances described above since two recognized facts eliminate any strong suspicion of the crime having been committed by him in the opinion of this court, namely

- (1) No clues of the crime (blood or tissue parts) were found on the two knives of the accused;
- (2) the blood adhering to the clothing of the accused was found to be exclusively blood of the accused (blood group 1); there was no blood of Speidell (blood group O).

There were strained relations existing among the crew members of the ship. It was known to at least some of the crew that Speidell was homosexually inclined and had a fairly large amount of cash at his disposal. It cannot be excluded with established certainty that some other crew member committed the crime.

Happenings that cannot be cleared up must not be taken as

*Affidavit of William E. Fuller in Opposition to Motion  
to Dismiss Pursuant to FRCP 37(d) or 41(b), Dated  
November 21, 1972*

- 4 -

the basis for a strong suspicion incriminating the accused as required for the making out of a warrant for arrest. The application for the making out of a warrant for arrest therefore had to be refused while the hospitalization order of December 17, 1966, had to be cancelled at the same time.

Bremerhaven, April 5, 1967  
The District Court  
sgd. Milz

The literal conformity of the foregoing photostatic copy with the original document before me is hereby notarised by me.  
Bremerhaven, August 19, 1970.

(L.S.not.) sgd. Joachim Hardow  
Notary Public

This is to certify that the foregoing translation gives the true meaning of the notarized photostatic copy of the document in the German language before me.

Bremen, Germany, October 16, 1970.



*S. Lohmann*

S. Lohmann

Reg.No. 571B

Sworn translator of the English language

## MEMORANDUM AND ORDER DATED DECEMBER 4, 1972 [REAGAN 8]

-----X  
 HOWARD REAGAN,

Plaintiff,

-against-

BATTERY STEAMSHIP CORPORATION,

Defendant. .  
 -----X

69 Civ. 1809

MEMORANDUM AND ORDER

Bricant, J.

By notice of motion dated June 14, 1972, and returnable June 29, 1972 before the undersigned, defendant sought an order pursuant to Rule 37(d), F.R.Civ.P., dismissing the action because of the failure of the plaintiff to appear for deposition pursuant to notice, or alternatively, pursuant to F.R.Civ.P., Rule 41(b), dismissing the action for failure to prosecute.

This motion was not answered, and by endorsement on that date was granted on default, but movant was directed to settle order and judgment of dismissal on notice. No such order or judgment has been signed.

Subsequently, plaintiff's counsel has moved for an

order vacating that determination. Plaintiff's counsel in New York now shows without contradiction that plaintiff is and has been imprisoned since September 15, 1969, and accordingly has been unable to appear for deposition or to prosecute the action. In January, 1973 it is said plaintiff will be eligible for parole, but there is of course no assurance that he will be paroled.

Sufficient cause appearing, the aforementioned determination granting the motion to dismiss on default of plaintiff to appear and oppose is vacated, and the motion is disposed of as follows:

Motion to dismiss for failure to appear for deposition pursuant to notice, or alternatively for failure to prosecute, is denied without prejudice to a renewal thereof in the event that plaintiff fails or refuses to submit to a deposition at Atlanta, Ga., or such other place as he may be imprisoned. Defendant may take plaintiff's deposition on oral testimony, subject to the direction, authorization and supervision of the Bureau of Prisons, at such institution where plaintiff may

A 19  
Memorandum and Order Dated December 4, 1972

presently be confined. Alternatively, defendant may conduct the deposition within thirty (30) days following plaintiff's release on parole, if he is released. If plaintiff is released, his attorneys shall notify defendant's attorneys within ten (10) days following such release.

If the defendant elects to take the plaintiff's deposition at Atlanta, Ga., or such other place within the continental United States as he may be confined, each party shall pay his own costs and expenses, and same shall be taxable in favor of the successful party to the extent that the Court may direct on the conclusion of the litigation.

So Ordered.

Dated: New York, New York  
December 4, 1972

*Charles L. Briant Jr.*  
\_\_\_\_\_  
CHARLES L. BRIANT, JR.  
U. S. D. J.

AFFIDAVIT OF ROBERT P. HART IN SUPPORT OF MOTION TO DISMISS  
DATED SEPTEMBER 7, 1976: IN REAGAN NO. 69 CIV. 1809

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

HOWARD REAGAN,

Plaintiff

-against-

BATTERY STEAMSHIP CORPORATION,

Defendant

AFFIDAVIT IN SUPPORT  
OF MOTION TO DISMISS  
PURSUANT TO FRCP 41(b)

No.  
69 CIV. 1809

- - - - - X

BRIEANT, J.

State of New York       )  
                              : ss.:  
County of New York     )

ROBERT P. HART, being duly sworn, deposes and says:

I am a member of the firm of KIRLIN, CAMPBELL & KEATING,  
attorneys for the defendant, BATTERY STEAMSHIP CORPORATION, here-  
in, and I am familiar with all the pleadings and proceedings here-  
tofore filed and had herein.

This is an action by one HOWARD REAGAN, a seaman. to  
recover damages for injuries allegedly sustained aboard the SS  
THUNDERHEAD on December 16, 1966, as well as his claim for False  
Arrest and Unlawful Imprisonment arising out of the incident of  
December 16, 1966. The action was commenced by the filing of a  
summons and complaint on April 30, 1969.

Plaintiff never has appeared for his examination before  
trial herein and has failed to take any other steps to prosecute  
his case.

*Affidavit of Robert P. Hart in Support of Motion to Dismiss  
Dated September 7, 1976: In Reagan No. 69 Civ. 1809*

On December 16, 1966, one JOSEPH J. SPEIDEL, was found with his throat cut while the vessel, SS THUNDERHEAD, was maneuvering in the harbor at Bremen, Germany. All the factors appeared to point to the plaintiff herein as the perpetrator of this crime. Subsequently, plaintiff was arrested by the German police and held for a period of three and one-half months.

Ultimately, in September 1969, plaintiff was indicted for burglary, robbery and murder in the United States District Court for the Northern District of Ohio. Plaintiff was convicted of manslaughter in October 1970 and sentenced to ten (10) years imprisonment. Plaintiff since has served his term in prison and has been released from Atlanta Federal Prison within the past year. Since his release plaintiff has made no effort to activate this matter.

It is, therefore, respectfully requested that the plaintiff's action be dismissed pursuant to F.R.C.P. 41(b) because of the failure of plaintiff to prosecute his action.

WHEREFORE, it is respectfully requested that the defendant's motion be, in all respects, granted.

---

ROBERT P. HART

Sworn to before me this :  
:  
day of September, 1976. :

---

Notary Public

AFFIDAVIT OF ROBERT P. HART IN SUPPORT OF MOTION TO DISMISS  
DATED SEPTEMBER 7, 1976: IN HARRIS NO. 72 CIV. 5200

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

JAMES E. HARRIS,

Plaintiff

-against-

BATTERY STEAMSHIP CORPORATION,  
as Owner of the SS THUNDERHEAD,

Defendant

AFFIDAVIT IN SUPPORT  
OF MOTION TO DISMISS  
PURSUANT TO FRCP 41(b)

No. 72 CIV. 5200

BRIEANT, J.

-----X

State of New York       )  
                              : ss.:  
County of New York     )

ROBERT P. HART, being duly sworn, deposes and  
says:

I am a member of the firm of KIRLIN, CAMPBELL & KEATING,  
attorneys for the defendant, BATTERY STEAMSHIP CORPORATION, here-  
in, and I am familiar with all the pleadings and proceedings here-  
tofore filed and had herein.

This affidavit is submitted in support of defendant's  
motion for an order pursuant to F.R.C.P. 41(b), dismissing the  
action because of the failure of the plaintiff to prosecute his  
action.

This is an action by one JAMES E. HARRIS, a seaman, to  
recover \$100,000. damages for injuries allegedly sustained aboard  
the SS THUNDERHEAD in November, 1966, and on or about the 16th day  
of December, 1966. The action was commenced by the filing of a

summons and complaint on or about December 7, 1972 (No. 72 CIV. 5200.)

Under date of May 8, 1973, there was filed herein an order by District Judge Brieant that the above action be transferred to the Suspense Docket of this Court, subject to reassignment to a Judge upon filing of a stipulation when Howard Reagan (69 CIV. 1809 - Brieant, J. - HOWARD REAGAN v. BATTERY STEAMSHIP CORPORATION) is released from prison.

Under date of June 17, 1976, a Minute entry pursuant to Memorandum from the Administrative office of the U.S. Courts, dated June 15, 1973, was filed herein, signed by District Judge Brieant, to the effect that there having been no action herein for over twelve months, there appears to be no further reason at this time to maintain the file as an open one for statistical purposes, and the Clerk was instructed to submit a JS-6 form to the Administrative office.

On December 16, 1966, one JOSEPH J. SPEIDEL, was found with his throat cut while the vessel, SS THUNDERHEAD, was maneuvering in the harbor at Bremen, Germany. All the factors appeared to point to one HOWARD REAGAN as the perpetrator of the deed. Howard Reagan was convicted of manslaughter and served a sentence therefor in Atlanta Federal Prison from which he was released within the past year.

*Affidavit of Robert P. Hart in Support of Motion to Dismiss  
Dated September 7, 1976: In Harris No. 72 Civ. 5200*

Since the release of Howard Reagan from prison, the plaintiff herein, JAMES E. HARRIS, has made no effort to activate or prosecute this matter.

It is, therefore, respectfully requested that plaintiff's action be dismissed pursuant to F.R.C.P. 41(b) because of the failure of plaintiff to prosecute his action.

Sworn to before me this :  
7<sup>th</sup> day of September, 1976:

NANCY L. KAVANAUGH  
Notary Public, State of New York  
No. 31-4613741. Qualified in N. Y. County  
Term Expires March 20, 1978

ROBERT P. HART  
ROBERT P. HART

\_\_\_\_\_  
Notary Public

AFFIDAVIT OF ROBERT P. HART IN SUPPORT OF MOTION TO DISMISS  
DATED SEPTEMBER 7, 1976: IN REAGAN NO. 72 CIV. 5201

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

- - - - -X

HOWARD D .REAGAN,

Plaintiff

A F F I D A V I T

-against-

No.  
72 CIV. 5201

BATTERY STEAMSHIP CORPORATION,  
as Owner of the SS THUNDERHEAD,

BRIEANT, J.

Defendant

- - - - -X

State of New York        )  
                              : ss.:  
County of New York        )

ROBERT P. HART, being duly sworn, deposes and  
says:

I am a member of the firm of KIRLIN, CAMPBELL & KEATING,  
attorneys for the defendant, BATTERY STEAMSHIP CORPORATION, here-  
in, and I am familiar with all the pleadings and proceedings here-  
tofore filed and had herein.

This affidavit is submitted in support of defendant's  
motion for an order pursuant to F.R.C.P. 41(b) dismissing the  
action because of the failure of the plaintiff to prosecute his  
action.

This is an action by one HOWARD D .REAGAN, a seaman,  
to recover damages for injuries allegedly sustained aboard the  
SS THUNDERHEAD on December 16, 1966, as well as various other

claims arising out of the incident aboard the SS THUNDERHEAD on December 16, 1966. The action was commenced by the filing of a summons and complaint on December 7, 1972.

Plaintiff never has appeared for his examination before trial herein and has failed to take any other steps to prosecute his case.

On December 16, 1966, one JOSEPH J. SPEIDEL, was found with his throat cut while the vessel, SS THUNDERHEAD, was maneuvering in the harbor at Bremen, Germany. All the factors appeared to point to the plaintiff herein as the perpetrator of this crime. Subsequently, plaintiff was arrested by the German police and held for a period of three and one-half months.

Ultimately, in September 1969, plaintiff was indicted for burglary, robbery and murder in the United States District Court for the Northern District of Ohio. Plaintiff was convicted of manslaughter in October 1970 and sentenced to ten (10) years imprisonment. Plaintiff since has served his term in prison and has been released from Atlanta Federal Prison within the past year. Since his release from prison plaintiff has made no effort to activate this matter.

It is, therefore, respectfully requested that plaintiff's action be dismissed pursuant to F.R.C.P. 41(b) because of the failure of plaintiff to prosecute his action.

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Affidavit of Robert P. Hart in Support of Motion to Dismiss  
Dated September 7, 1976: In Reagan No. 72 Civ. 5201

WHEREFORE, it is respectfully requested that the  
defendant's motion be, in all respects, granted.

ROBERT P. HART  
ROBERT P. HART

Sworn to before me this :

7<sup>th</sup> day of September, 1976 :

NANCY L. KAVANAUGH  
Notary Public, State of New York  
No. 314 19761. Qualified in N.Y. County  
Term Expires March 30, 1977

Notary Public

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TRANSCRIPT OF PROCEEDINGS OF SEPTEMBER 27, 1976  
[HARRIS 13, REAGAN 13 & 18]

1 rme

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x  
5 HOWARD D. REAGAN, :

6 Plaintiff, :

7 -against- :

69 Civ. 1809  
72 Civ. 5201

8 BATTERY STEAMSHIP CORPORATION, :  
9 as owner of the SS THUNDERHEAD, :

10 Defendant. :  
11 -----x

12 JAMES E. HARRIS, :

13 Plaintiff, :

14 -against- :

72 Civ. 5200

15 BATTERY STEAMSHIP CORPORATION, :  
16 as owner of the SS THUNDERHEAD, :

17 Defendant. :  
18 -----x

September 27, 1976  
9:50 a.m.

19  
20 BEFORE:

21 HON. CHARLES L. BRIEANT,

22 District Judge

23  
24 (Appearances continued on page 2.)  
25

rme

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## A P P E A R A N C E S

FULLER, LAWTON &amp; MOYLES, P.C.

Attorneys for Plaintiffs

BY: WILLIAM FULLER, ESQ.

KIRLIN, CAMPBELL &amp; KEATING, ESQS.

Attorneys for Defendants

BY: ROBERT P. HART, ESQ.

oOo

MR. HART: Robert P. Hart, Kirlin, Campbell  
and Keating, representing Battery.

MR. FULLER: William E. Fuller, Fuller, Lawton  
& Moyles, P.C., presenting in dissolution, at 17 Battery  
Place, New York, New York, 10004.

THE COURT: Who has the motion?

MR. HART: It is my motion --

MR. FULLER: May I speak first to call the  
Court's attention to the fact that these two cases have been  
on the suspense calendar for a long time and I had no notice  
of their removal from the suspense calendar.

THE COURT: Don't worry about it. The suspense  
calendar is for the convenience of the Court. Litigants  
have no rights under those provisions. As I understand it,  
the reason these cases were put on the suspense calendar is  
because somebody was in prison.

1 rme

3

2 MR. FULLER: Mr. Reagan was in prison, your  
3 Honor. He is out of prison now, although he presumably  
4 lives in Cleveland. I have not been able to apprise him  
5 of the fact that this matter has been suddenly --

6 THE COURT: When did you receive the service of  
7 the notice of motion in this case?

8 MR. FULLER: September 7, your Honor.

9 THE COURT: You couldn't communicate with Cleve-  
10 land between September 7 and today?

11 MR. FULLER: May I explain? The firm of Fuller,  
12 Lawton and Moyles is in dissolution and I don't have a  
13 secretary to prepare our position papers --

14 THE COURT: The firm that is in dissolution may  
15 be the subject of a malpractice claim if they don't take  
16 care of matters before they are reassigned to somebody else.

17 MR. FULLER: I am in that process. I have been  
18 out of the active practice of the law for over a year. I  
19 have been keeping the office open to conclude these matters  
20 and these matters, as well as two other cases, are all that  
21 I know I have left.

22 THE COURT: What are you going to do with this  
23 case?

24 MR. FULLER: These motions were brought simply  
25 because Mr. Hart was aware of my inability and I cannot

1 rme

4

2 continued in the practice of law because of eye disability.

3 I have gotten out of the practice of law and have been placed  
4 on the temporary disability list --

5 THE COURT: What do you want me to do?

6 MR. FULLER: If you would issue an order removing  
7 this case from the suspense calendar --

8 THE COURT: Not necessary. You have nothing to  
9 do with our docketing practices.

10 MR. FULLER: I have an indigent client in  
11 Cleveland. I don't know where Mr. Harris is. My last infor-  
12 mation is that he was in Washington, D.C. and I have been  
13 unable to go there, to write to or collect information from  
14 them.

15 THE COURT: I will continue the motion for two  
16 weeks while you handle it properly. You had since September  
17 7 and I can't understand how a substantial law firm can be  
18 in dissolution and have nobody attending to its cases.

19 MR. FULLER: The firm is in dissolution, the  
20 partners are gone --

21 THE COURT: You are liable if they do that.

22 MR. FULLER: Mr. Hart knows this and he brought  
23 it along at this time and I would request an interval of time  
24 longer than two weeks to be required to go to the expense  
25 of getting another attorney, seeing if my clients want to

1 rme

2 carry the case, or prosecute it further by amending against  
3 the United States, and a few other points.

4 THE COURT: October 8, 9:30. The motion is  
5 continued for a-l purposes until then. If he is not repre-  
6 sented by an attorney and does not show a desire to prosecute  
7 on that date, I will dismiss the claims for failure to prose-  
8 cute.

9 Do you represent both of these fellows?

10 MR. FULLER: They are both involved in the same  
11 case, on the same ship at the same time, in 1966 in  
12 Germany, your Honor.

13 THE COURT: I don't understand why it has not  
14 been tried.

15 MR. FULLER: Because the Government is faced with  
16 a position of bringing that criminal action against Mr.  
17 Raegan further to the civil suit. I have also tried many  
18 times, every time I see Mr. Hart, to try to get a nominal  
19 settlement and a release.

20 THE COURT: You are entitled to do that, but,  
21 you see, a law firm cannot put itself in a position of not  
22 having a secretary to write to clients at their last known  
23 address and tell clients there is a problem.

24 MR. FULLER: My secretary left September 1.

25 THE COURT: Get somebody from Office Help

A 33  
*Transcript of Proceedings of September 27, 1976*

1 rme

6

2 Temporaries, charge it to the dissolution account. I don't  
3 have to tell you that.

4 MR. HART: Your Honor, I did not take advantage  
5 of Mr. Fuller. I have known Mr. Fuller for 20 years and thin  
6 too highly of him. This case has been kicking around since  
7 1969 --

8 THE COURT: Why don't you discuss the possibility  
9 of a modest settlement?

10 MR. HART: My client doesn't want to pay anything

11 THE COURT: The client who doesn't want to pay  
12 anything winds up paying legal fees instead.

13 October 8, 9:30 a.m.

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TRANSCRIPT OF PROCEEDINGS OF NOVEMBER 3, 1976  
[HARRIS 14, REAGAN 14 & 19]

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

HOWARD REAGAN, :

Plaintiff, :

- v s - :

69 Civ. 1809

BATTERY STEAMSHIP CORPORATION. :

72 Civ. 5201

Defendant. :

-----x

JAMES E. HARRIS, :

Plaintiff, :

- v s - :

72 Civ. 5200

BATTERY STEAMSHIP CORPORATION, :

Defendants. :

-----x

New York, N. Y.  
November 3, 1976 - 9:30 a.m.

B e f o r e : HON. CHARLES L. BRIEANT,  
District Judge.

A p p e a r a n c e s :

FOR THE PLAINTIFF:

FULLER, LAWTON & MOYLES, ESQS.,  
[No appearance.]

FOR THE DEFENDANT:

KIRLIN, CAMPBELL & KEATING, ESQS.,  
By: ROBERT P. HART.

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2 THE CLERK: Reagan against Battery Steamship.

3 MR. HART: I haven't seen anybody here on  
4 behalf of the plaintiff. There are two cases, Reagan  
5 and Harris.

6 THE COURT: Yes. I think they were here last  
7 time and, if I remember correctly, I had given an extension  
8 of time for them to resolve whatever difficulties there  
9 might be before I considered the matter again and I  
10 believe, if memory serves correctly, I had discussed the  
11 matter with the understanding that if the plaintiffs  
12 were not represented by attorneys and didn't appear on  
13 this continued date and did not show a desire to prosecute  
14 the action that I would dismiss both the claims for  
15 failure to prosecute.

16 MR. HART: Yes, sir.

17 THE COURT: I think that is appropriate to  
18 do. Have you heard anything from Mr. Fuller on anybody  
19 representing these plaintiffs?

20 MR. HART: I got a letter making a demand  
21 in each case, an outrageous demand.

22 THE COURT: Did you respond?

23 MR. HART: I didn't respond to it, no. I  
24 spoke to him on the telephone and told him I wouldn't  
25 consider it.

1 gwsr

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2 THE COURT: All three motions are granted  
3 and the Court notes the default of the plaintiffs to pro-  
4 ceed in all respects notwithstanding the direction pre-  
5 viously made by the Court formally and on the record.

6 All these three matters will be dismissed for failure  
7 to prosecute. I will endorse the motions accordingly.  
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9 MR. HART: Thank you.

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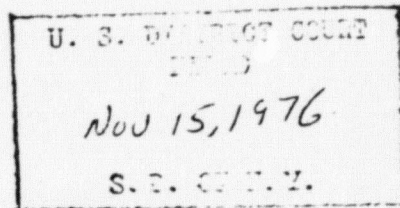
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A 37  
JUDGMENTS APPEALED FROM

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



-----X  
HOWARD D. REAGAN,

Plaintiff

-against-

BATTERY STEAMSHIP CORPORATION,  
as Owner of the SS THUNDERHEAD,

Defendant  
-----X

FINAL JUDGMENT  
OF DISMISSAL  
WITH PREJUDICE

No. 72 CIV. 5201  
(C.L.B.)

The Court, by memorandum decision and order, dated November 3rd, 1976, and endorsed on the notice of motion of the defendant to dismiss the action, having granted the said motion and having provided therein that the action be dismissed, with prejudice, for failure to prosecute, it is, in accordance with the requirement of Rule 58 of the Federal Rules of Civil Procedure that every judgment shall be set forth in a separate document,

ORDERED and ADJUDGED that the above entitled action be and hereby is dismissed with prejudice.

Judgment Entered: November 15 1976.

APPROVED: November 12 1976.

Raymond F. Burghardt  
Clerk

Charles L. Brucant  
U.S.D.J.

[Since the bodies of all three FINAL JUDGMENTS OF DISMISSAL WITH PREJUDICE are, verbatim, the same, we only reproduce one in the APPENDIX]

(61198)

Due and timely service of *TWO* copies  
of the within *BRIEF AND APPENDIX* is hereby  
admitted this *11TH* day of *MARCH* 197*7*

.....  
Attorney for *APPELLEE*

**COPY RECEIVED**

MAR 11 1977

KIRLIN, CAMPBELL & KEATING